

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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BOBBIE TORRY,

Plaintiff,

ORDER

v.

11-cv-748-wmc

SEAN SALTER,

Defendant.

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Plaintiff Bobbie Torry filed a proposed complaint in this case on November 2, 2011, alleging that defendant Sean Salter violated his due process rights under the Fourteenth Amendment of the United States Constitution as a result of an allegedly defective prison disciplinary hearing. In an order entered on December 3, 2013, the court dismissed Torry's claim for failure to exhaust administrative remedies, and in a subsequent order, the court denied Torry's motion to alter or amend the judgment.

On April 10, 2014, Torry filed a "second motion to alter or amend the judgment," in which he asks the court to refund his filing fee. (Dkt. #26.)<sup>1</sup> In his motion, Torry cites to *Owens v. Keeling*, 461 F.3d 763, 773 (6th Cir. 2006), in which the Sixth Circuit held that a second filing fee should not be assessed to a prisoner whose initial complaint is dismissed without prejudice for failure to exhaust.

Unlike here, the district court in *Owens* dismissed the plaintiff's first action and denied him leave to proceed because of his failure to plead affirmatively that he had exhausted his

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<sup>1</sup> In his motion, Torry seeks reimbursement for the filing fee in 11-cv-830, a case which is still open. That case, however, does not concern any allegations against Salter raised in case nos. 10-cv-378 and 11-cv-748. Accordingly, the court assumes Torry seeks reimbursement of the filing fee in *this* action.

claims. In holding that the prisoner should not have been assessed a second filing fee, the Court of Appeals explained: “a prisoner who ‘refiles’ a complaint alleging the same claims regarding prison conditions after it was initially dismissed without prejudice for failure to exhaust is not ‘instituting’ a suit, but is merely following the particular procedure chosen by this court for curing the initial complaint’s deficiency.” *Id.* at 773.

Here, Torry’s first action (No. 10-cv-378) was screened to go forward, then dismissed after defendant raised exhaustion as an affirmative defense. Unlike the Sixth Circuit, this court does not typically require prisoners to allege exhaustion in order for their complaints to clear screening. Were such an allegation were required, the court would likely find a complaint lacking that allegation deficient under Rule 8 and allow the prisoner to submit an amended complaint in the same action, thus avoiding a second filing fee. Here, however, defendants were required to answer and the case was eventually dismissed for failure to exhaust. Having then filed a complaint containing the same allegations as those in the first action, Torry “instituted” a second suit under 28 U.S.C. § 1915, which requires payment of the filing fee.

Even if this distinction were meaningless, the Seventh Circuit has not embraced the holding in *Owens*, nor has any other circuit court or any district court within the Seventh Circuit as far as the court was able to determine. Similarly, this court is disinclined to make new law in the face of a statute requiring prisoners to pay filing fees. *See* 28 U.S.C. § 1915. The court is particularly disinclined to do so here, given that Torry chose to file a second suit despite *still* not exhausting his administrative remedies.

ORDER

IT IS ORDERED that Torry's request for a reimbursement of the \$350 fee paid for filing this case (dkt. #26) is DENIED.

Entered this 21st day of May, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge